

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2010AP1601

Cir. Ct. No. 2009CV246

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF: JUNEAU COUNTY LITTLE YELLOW DRAINAGE DISTRICT:

JUNEAU COUNTY LITTLE YELLOW DRAINAGE DISTRICT,

APPELLANT,

V.

RONALD KRIZAN, SUSAN KRIZAN, VICTOR ASSELIN, KAREN ASSELIN, N. THOMAS BAILLES, SCOTT BAILLIES, ERIC BAILLIES, CHERYL A. BAKER, SHERRY BARRICK, BILLY BAUMGART, SANDRA BAUMGART, RAYMOND BARITSKY, ALEXANDER BARITSKY, ROGER D. BARTON, SUE A. BARTON, DAN BECKMAN, MARGARET BECKMAN, BRET J. HILLYER, DONALD J. BOLLIG, JAMES L. BIERMAN, MILDRED I. BIERMAN, MARK C. BEHRENS, MICHAEL S. BLECH, JOHN R. BLOTT, DONALD J. BOLLIG, MIKE BOLCEREK, MILO M. BRICK, SUSAN BOLCEREK, DALE R. BROBST, ELLEN N. BROBST, JAMES A. BROWN, DIANE M. BROWN, ROBERT G. BROWN, IVER BURKE, JAYNE CHRISTIANSEN, JOHN CLINGE, MADYLON CLINGE, RICHARD L. COLLER, LYNNE C. COLLER, ROBERT COLLER, DOREEN R. COLLER, BILL COLLER, LAWRENCE DESHOTEL, EUNICE DESHOTEL, WALTER DONALDSON, MARY DONALDSON, SHARON R. DOWNING, JULIE A. DUWE, JOHN DUWE, AMANDA FELBER, JON FELBER, EUGENIUSZ FIEJTEK, ZOFIA FIEJTEK, DALE FLOCK, PAM FLOCK, VIRGINIA FOGLE, GEORGE FREY, SUSAN J. FREY, GENE FRY, JEANINE FRY, NANCY E. GALOW, PAUL GASSER, PAUL J. GRUBER, TIM GOLTZ,

JUDITH K. GOLTZ, FRANK J. GUNTLY, JUDITH J. GUNTLY, ALAN L. HANSON, KAREN M. HANSON, ROGER H. HARGES, SANDRA L. HARRY, DANIEL H. HAY, PAULETTE M. HAY, SCOTT D. HERKER, DANIEL HUNKINS, RYAN T. HUNKINS, SR., SHEILA HUNKINS, ALBERT J. IMMENGA, H. JAROST, JACK JASINSKI, JR., GARY JASURDA, MARIAN JASURDA, STEVE JON, AL JOHNSTON, PETER JOZAITIS, KATHRYN JOZAITIS, ALAN K. PETERSON, KELVIN KADDATZ, KEVIN J. KAVANAGH, KAREN M. KAVANAGH, DAVID KEARNS, ROSEMARIE KEARNS, SCOTT M. LAGER, MAUREEN MCHIE, JON LAVOY, JULIE LAVOY, TAMIE LAVOY, JACOB LAVOY, DAN LESSARD, KEVIN C. LUKAS, SHERRY L. MAJORS, JEROME MARTENS, DONNA MARTENS, KENNETH EUGENE MURPHY, SCOTT C. MULLIN, JAMES MATURNO, ANN MATURNO, WILLIAM F. MATURNO, THOMAS MEARS, KAREN MEARS, THOMAS MARQUARDT, TERESSA MARQUARDT, DAN MATSON, DIANE MATSON, JERRY VENTRELLO, BRUCE WINGET, KIMBERLY WINGET, JAMES W. LEMKE, ERIC A. WITTAK, LAUREEN A. WITTAK, SANDIE M. WOOD, SHARYN KILMER, MICHAEL F. WILLEMS, STEVE WILLEMS, ALICIA YERGES, DUANE A. YERGES, DANIEL ZANE, MARY JO ZANE, PATRICIA A. ZIEGLER-MAASS, JOSEPH L. ZIPPERER, ELVIN TORRES, JACQUELINE BAEZ, JOHNNIE VISGAR, WAVA VISGAR, KEN WAJERSKI, MARY C. WAJERSKI, JAMES D. WARNER, PATRICIA I. WARNER, JEFFREY A. WASURICK, FRANK T. WAYZER, KATHLEEN WAYZER, ALAN WEISENSEL, ANNETTE WEISENSEL, DUANE WEISENSEL, DOROTHY WEISENSEL, JOHN H. WENZEL, PATRICIA A. WENZEL, DONALD R. BENTZ, JEFFREY R. BENTZ, CINDY S. BENTZ, JAN NALEPA, GREG NALEPA, MARK W. NELL, CYNTHIA A. NELL, KAREN L. NELSON, RICHARD NELSON, GORDON NEWMAN, DOROTHY NEWMAN, DAVID S. OLSON, REBECCA OLSON, RONALD OLSON, DAVID OLSON, DWIGHT A. NEUROTH, CHRISTINE PADGETT, DARLENE R. PICKETT, GEORGE PFISTER, JENNIE PFISTER, SEAN POLLAK, JULIE POLLACK, JOHN PUSTOLA, CAROL A. PUSTOLA, CHARLES RADL, BERNICE RADL, CHAD SCHLICHTING, LISA SCHLICHTING, JUNIOR A. SHEPSTONE, MARION L. SHEPSTONE, DIANE L. SKARIE, EDWIN SIEMERS, ALFRED L. SMITH, MARY F. SMITH, JOSHUA C. ST. JOHN, DEBRA ST. JOHN, JEAN M. SORENSON, RYAN V. SORENSON, JAMES G. STECKLING, MARY STEPHENS, SUSAN STIEVE, DAVID J. ROARK, CYNTHIA L. ROARK, RAYMOND ROZEK, LARRY W. RAVENSCROFT, DONNA J. RAVENSCROFT, JOANN REICHENBERGER, RUSS REICHENBERGER, DENISE L. RICHTER, DAVID SANTANA, JACQUELINE SANTANA, DAVID D. SCHLIEM, SR., YVONNE SCHLIEM, MARK SCHLAIKOWSKI, JOANNE M. SCHLAIKOWSKI, GREGORY SUTTON, GAYE SUTTON, RICHARD A. SUTTON, ROBERTA C. SUTTON, RONALD SWEEN,

ELIZABETH SWEEN, DANJA L. TEXLEY, DAVID L. TEXLEY, WILLIAM B. THOMAS, CARLYN A. THOMAS, EUGENE E. THOMPSON, SANDRA M. THOMPSON, ALVIN A. THOMPSON, HELEN J. THOMPSON, BARBARA TINUCCI, ROBERT TINUCCI, JERRILYNN V. TORMOEN, DENNIS E. REMSHEK AND DIANE A. REMSHEK,

RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County:
TODD P. WOLF, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. This case concerns a petition filed by certain landowners who own property located within the Juneau County Little Yellow Drainage District to dissolve the District pursuant to WIS. STAT. § 88.82. (2011-12).¹ The circuit court granted the petition and dissolved the District on the ground that the landowners were no longer receiving a benefit from the District because the District was no longer primarily being used for its original purpose, which the court found was to enhance farming opportunities. Based on this finding, the court concluded that the landowners had met their burden to prove that dissolving the District would promote the “public welfare,” one of the three criteria that landowners must meet for a court to dissolve a drainage district under § 88.82.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶2 The dispositive issue on appeal is whether the evidence was sufficient to establish that “the public welfare will be promoted by dissolution of the district.”² WIS. STAT. § 88.82(3). We conclude that it was not. We therefore reverse and remand to the circuit court to enter an order dismissing the dissolution petition.

BACKGROUND

¶3 To place this case in context, we begin by providing a description of the features and the history of the District. The District consists of over 6000 acres to the south of the Necedah National Wildlife Refuge, from which water flows into the District. The Little Yellow River flows to the south and east through the District.

¶4 The District was created by order of the Juneau County Circuit Court in the late 1800s. In the 1920s, the District was active in the construction and maintenance of drainage ditches. Between 1934 and 1997, the District became inactive and stopped constructing and maintaining drainage ditches. This period of inactivity ended when the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) created new rules that required the District to remap its boundaries and bring the District into compliance with administrative regulations. *See generally*, WIS. ADMIN. CODE § ATCP 48. By 2001, the District’s maps were brought into compliance with administrative regulations, and

² The District also argues that the circuit court applied the wrong legal standard in concluding that dissolving the District would promote the public welfare. Because we reverse on the ground that the record does not support the court’s conclusion that the landowners met their burden of proving that dissolution would promote the public welfare, we need not address that issue. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

the District resumed its drainage activities. Since that time, the District's activities have primarily involved the widening of ditches and the clear-cutting of trees and other obstructions to create thirty-foot corridors along the sides of the ditches to ensure adequate land drainage and to prevent flooding in the area.

¶5 In June 2009, a petition for dissolution of the District was filed in the Juneau County Circuit Court by some individuals who own land within the District. A hearing was held before the circuit court on the petition. Ten landowners testified in support of the petition for dissolution of the District; the District presented testimony from several experts and from various local government officials in opposition to the petition for dissolution. In an oral ruling, the circuit court concluded that the landowners had demonstrated that dissolving the District would promote the public welfare and granted the petition to dissolve the District. The District appeals. Additional pertinent facts will be provided in the discussion section below.

DISCUSSION

¶6 As we have indicated, the dispositive issue on appeal is whether the evidence is sufficient to support the court's conclusion that dissolving the District would promote the public welfare. Based on our review of the entire record, we conclude that the landowners failed to present sufficient facts to show that dissolution of the District would promote the public welfare.

¶7 Before turning to our standard of review, we begin by providing background on the law pertaining to drainage districts. The creation and dissolution of drainage districts is governed by WIS. STAT. ch. 88. Drainage districts may be created by petition to a circuit court "by the owners of more than one-half the land area proposed for inclusion, or the majority of landowners

owning at least one-third area in the lands proposed for inclusion.” *Town of Stiles v. Stiles/Lena Drainage Dist.*, 2010 WI App 87, ¶11, 327 Wis. 2d 491, 787 N.W.2d 876 (citing WIS. STAT. § 88.27(1)(a), (b)). A drainage district may be created only if doing so “will promote the public health or welfare and if the proposed work will improve land within the district.” *Id.* (citing WIS. STAT. § 88.34(3)(b), (c)). The court appoints a drainage board, which “manages the district and is authorized to levy assessments against landowners for costs of maintenance and repair of the drainage system.” *Id.* (citing WIS. STAT. §§ 88.17(1), 88.23).

¶8 WISCONSIN STAT. § 88.82 governs the dissolution of a drainage district. There are three requirements that landowners seeking to dissolve a drainage district must satisfy before a court will dissolve a district: (1) landowners “representing 67% or more of the confirmed benefits in a drainage district” must file a petition to dissolve a district in the circuit court; (2) all of the district’s debts must be paid; and (3) the landowners must show that “the public welfare will be promoted by dissolution of the drainage district.” WIS. STAT. § 88.82(1)(b), (2), and (3).

¶9 As we explain in *Town of Stiles*, when a drainage district is dissolved, drains maintained by the district “become ‘common waterways for the use of all landowners in the dissolved district’ and for which no supervising authority retains control.” *Town of Stiles*, 327 Wis. 2d 491, ¶17 (quoting WIS. STAT. § 88.82(6)).

¶10 The only issue on appeal is whether the landowners have presented sufficient evidence that satisfies the third requirement for dissolution—that dissolution will promote the public welfare. Before we explain why we conclude

that the landowners did not satisfy the third requirement for dissolution, we provide the standard of review in this case.

¶11 We uphold the circuit court’s findings of fact unless clearly erroneous. *Id.*, ¶10. We will not “reweigh the evidence or reassess the witnesses’ credibility, but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not.” *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. Applying the court’s findings of fact to the legal standard governing dissolution presents a question of law subject to de novo review. *Town of Stiles*, 327 Wis. 2d 491, ¶10. In general, a court’s determination on whether dissolution would promote the public welfare is entitled to “additional weight” because it is “intricately woven with the factual findings.” *Id.* (citing WIS. STAT. § 88.03, which establishes that court proceedings under ch. 88 “are equitable in nature”). However, the circuit court’s legal conclusion is not controlling when the circuit court bases its decision on “a mistaken view of the evidence or an erroneous view of the law.” *Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

¶12 Before determining whether the record supports the circuit court’s conclusion that dissolving the District would promote the public welfare, we start by examining what is meant by “public welfare” within the meaning of WIS. STAT. § 88.82(3). “Public welfare” is not defined in ch. 88. In *Town of Stiles*, in which we addressed whether a circuit court erred in granting a petition to dissolve a drainage district, we declined to provide a definition explaining what “public welfare” means but determined that the definition excludes a benefit that serves only a private landowner and not the public welfare:

The purpose of [requiring a “public welfare” determination] is to guarantee that the relevant act does not inure to the benefit of private owners or entities without also serving or promoting some overarching public interest.... [T]he “public welfare” concept escapes precise definition, and necessarily involves consideration of numerous factors

Town of Stiles, 327 Wis. 2d 491, ¶15 (citations omitted). While we did not specify in *Town of Stiles* what factors a court should consider in determining whether dissolution would promote the “public welfare,” it makes sense to consider whether dissolution of the District would promote adequate land drainage and prevent flooding in the area.

¶13 We turn now to examine the evidence presented at the trial and, based on that examination, we conclude that the landowners have not carried their burden of showing that dissolution of the District would promote the public welfare.

¶14 As we indicated, a hearing was held before the court on the landowners’ petition to dissolve the District. Ten landowners testified in support of the petition. Of these landowners, three use their land primarily for agricultural farming purposes; the remaining landowners use their land for recreational and other purposes, such as tree farming. The landowners presented no expert testimony regarding the impact dissolving the District would have on the public welfare.

¶15 During their testimony at the hearing, the landowners voiced numerous concerns regarding the effects the District’s drainage activities have on their individual parcels of land. The landowners testified that the widening of ditches and removal of trees creates openings for trespassers, reduces the amount of land available for hunting, contributes to erosion, diminishes the aesthetic value

of the land, destroys wildlife habitats, and destroys trees that could be used for timber production. All of the landowners who testified stated that the District is no longer needed for drainage purposes, with several citing to the fact that they experienced no significant problems with flooding during the sixty-three year period when the District was inactive or since the District has resumed its drainage activities. The landowners indicated that high water levels in the ditches increase the potential for flooding and testified that the District's activities have not noticeably lowered the water levels in the ditches. At least one of the landowners testified that, if the District were dissolved, he would be able and willing to maintain his own drainage ditch. The landowners testified that they were no longer receiving a benefit from the District and that dissolution, in their view, would free them from paying taxes for something from which they do not realize a benefit.

¶16 Three drainage experts testified at the hearing, all in opposition to the dissolution of the District. The drainage experts, including the current state drainage engineer for DATCP, testified that the dissolution of the District would impede drainage of land and that over time the water levels will become as high as they were prior to the creation of the District in the late 1800s, when the water levels were much higher than they are now, thus creating a greater potential for flooding in the area. The drainage experts warned that, as a consequence of higher water levels in the ditches, the land would be less able to support crops, septic systems would fail, basements would flood, and roads would be damaged. The experts testified that it would be difficult for the landowners to coordinate drainage activities amongst themselves if the District were dissolved. Members of the drainage board and other local government officials echoed similar views about what would happen to drainage in the District if the District were dissolved.

¶17 After hearing the evidence, the court granted the petition to dissolve the District on the ground that the original purpose of the District was to drain land for farming purposes, and the District was no longer used primarily for farming purposes and therefore the District no longer promoted the public welfare. The court pointed out that very few landowners in the District use their land for farming and, based on that observation, concluded that the landowners had met their burden to prove that dissolution would promote the public welfare.

¶18 We conclude that the circuit court's findings do not support its conclusion that dissolving the District would promote the public welfare. Under the facts of this case, the original purpose for organizing the District in the late 1800s, which the court concluded was to drain the land for farming purposes, in itself has little, if any, bearing on whether dissolving the District would promote the public welfare. The District's drainage of land at this time promotes the public welfare for reasons unrelated to farming. Indeed, here the record clearly indicates that drainage continues to be necessary in this area where, by even the landowners' own accounts, the water levels in the ditches are high.³

³ While we conclude that it is not relevant, we note as an aside that the circuit court's finding that the District was organized solely to enhance farming opportunities is clearly erroneous because it is not supported by the record. A notice of hearing from 1901 regarding the petition for the organization of the District reveals that the purpose of the District was not simply to promote farming but to "improve the channel of said Yellow [R]iver by clearing and removing obstructions therefrom" and "to improve and maintain such levees, drains, ditches, [and] dams ... as shall be useful for the purpose of draining the said lands." The undisputed evidence shows that the primary purpose of the District was to drain land to prevent flooding and other harmful effects of rising water levels for the benefit of all landowners in the District, and the public generally. We do not consider controlling the circuit court's legal conclusion that dissolution would promote the public welfare because the circuit court based its determination on an erroneous view of the evidence regarding the purpose for organizing the District. See *Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

¶19 Because a circuit court will not be overturned when its decision was correct but for the wrong reason, *see State v. Alles*, 106 Wis. 2d 368, 391-92, 316 N.W.2d 378 (1982), the question turns to whether the landowners presented any facts to establish that dissolution of the District would promote the public welfare. We conclude that they did not.

¶20 We first observe that none of the evidence presented by the landowners relates to how dissolution would promote the public welfare but instead relates to how dissolution would “inure to the benefit of private owners,” which we concluded in *Town of Stiles* does not, by definition, promote the public welfare. *See Town of Stiles*, 327 Wis. 2d 491, ¶15. We provide three representative examples of the evidence the landowners relied on in support of their petition to dissolve the District and explain why that evidence does not demonstrate that dissolving the District would promote the public welfare.

¶21 The first example of evidence relied on in support of the petition to dissolve the District is testimony from the landowners that the creation of thirty-foot corridors along the sides of the ditches creates openings for trespassers, diminishes the amount of land that may be used for hunting, causes erosion in some of the ditches, and reduces the amount of land that may be used to cultivate tree farming. However, the landowners failed to explain how the elimination of the District, and these alleged consequences of the District’s work, would promote the public welfare, and not simply “inure to the benefit of private owners.” *Id.* While the landowners testified that the District’s activities negatively impact their individual parcels of land, no testimony was offered in favor of dissolution, such as from an expert, explaining why dissolution would promote the public welfare. The testimony regarding allegations of trespassing, diminished hunting, and the loss of land for tree farming primarily came in the form of sweeping, conclusory

assertions that were unsupported by any specific evidence that the harms feared by or suffered by the landowners represent harms to the public welfare.

¶22 As was the case in *Town of Stiles*, it appears from the landowners' testimony here that what is truly at issue in this case is dissatisfaction by at least some landowners over how the District performs its work. For instance, Susan and Ronald Krizan, who own the largest farm in the District, complained that when the District digs the drainage ditches, the District is doing "more damage" than good. Similarly, Ellen Brobst, who owns thirty-two acres of land that she uses for hunting and for recreational use, complained that the District pushed brush, stumps, and other materials off to the side of the ditch and left the materials there. She testified that the excavation of the ditches and the cutting of trees and brush negatively impact the environment in her area. Although some of the landowners were dissatisfied with how the District conducted its drainage activities, none of the testimony explained how dissolution of the District would promote the public welfare.

¶23 Moreover, in their brief on appeal, the landowners do not explain what bearing the alleged shortcomings of methods used by the District have on whether the public welfare would be promoted by dissolving the District. The question presented in this appeal is whether the court was presented with proof that dissolution would promote the public welfare. The evidence alleging shortcomings in how the District conducts its work does not support the conclusion that dissolution would promote the public welfare.

¶24 We turn now to the second example of evidence the landowners relied on in support of their dissolution petition. The landowners contend that the dissolution of the District would promote the public welfare based on their

testimony that they did not experience significant flooding while the District was inactive for sixty-three years and that, with the exception of one landowner, they have not noticed lower water levels since the District resumed its drainage activities. In their view, the District serves no useful purpose because they have not observed any difference in the water levels in the ditches since the District has resumed its drainage activities.

¶25 The problem, however, is that the landowners failed to explain why dissolution would promote the public welfare in light of their observations that the District's resumed drainage activities have had no observable impact on the water levels. For example, the landowners offered no testimony or documentary evidence to explain *why* the water levels in the ditches now maintained by the District have not noticeably changed since the District resumed maintaining the ditches after a more than sixty-year repose. Do the landowners' observations mean that the District is in fact serving its intended purpose by continuing to drain the land and preventing the water levels from further rising? Or do their observations mean that the ditches adequately drain the land in the District without the need for any further maintenance by the District? The landowners provided no testimony to shed light on these and other questions regarding the impact that dissolution would have on the water levels and the resulting effects on the public welfare.

¶26 We note that the only testimony regarding the effect that dissolution of the District would have on the water levels in the ditches was provided by the drainage experts. The drainage experts testified that, if the District is dissolved, water levels will revert back to their former levels from the late 1800s, which were higher than they are now. The landowners presented no testimony or documentary evidence opposing the experts' testimony and therefore it is uncontested that

dissolution will cause the water levels in the ditches to rise over time and that eventually the water levels will be higher than they were prior to the creation of the District in the late 1800s. Although the circuit court is not required to accept the testimony provided by experts, and may even reject uncontroverted testimony, *see State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752, the court must have some logical or factual basis for its conclusion that dissolution will promote the public welfare. We conclude that the landowners' testimony that they have observed no difference in the water levels in the ditches since the District has resumed its drainage activities does not provide a logical or factual basis for that legal conclusion.

¶27 Finally, we turn to the third example of evidence the landowners relied on in support of their petition. At least one landowner testified at the hearing that dissolution would promote the public welfare because he is able and willing to privately maintain his own ditch, and several landowners at least indicated that they could coordinate drainage activities amongst themselves. However, as we stated in *Town of Stiles*, “the claimed willingness of other [individuals or] entities to assume drainage duties has little bearing on whether elimination of [a] [d]istrict will promote the public welfare.” *Town of Stiles*, 327 Wis. 2d 491, ¶17. As we stated above, this is because there is no formal authority in a dissolved district, and the drains in a dissolved district become ““common waterways for the use of all landowners in the dissolved district.”” *Id.* (quoting WIS. STAT. § 88.82(6)). Efforts by individual landowners to coordinate drainage activities with other landowners in the area are likely to create chaos because no landowner is required to coordinate drainage activities with other landowners. And, even if a landowner wishes to coordinate drainage activities with the other landowners, landowners may be required to obtain state permits before conducting

drainage activities, increasing the likelihood of chaotic coordination efforts. Applying our reasoning in *Town of Stiles* to the facts of this case, we conclude that the expressed or implied intent of some of the current landowners to assume drainage duties into the future does not support the court's conclusion that dissolution would promote the public welfare.

¶28 Because none of the evidence presented by the landowners supports a determination that dissolution would promote the public welfare, and the only relevant evidence before the court supported denying the petition to dissolve the District, we conclude that there is insufficient evidence to support the circuit court's conclusion.

CONCLUSION

¶29 For the above reasons, we conclude that the record does not support the circuit court's determination that dissolving the District would promote the public welfare. We therefore reverse and remand to the circuit court to enter an order dismissing the dissolution petition.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

